

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**INTERNATIONAL ASSOCIATION OF SHEET
METAL, AIR, RAIL AND TRANSPORTATION
WORKERS LOCAL UNION NO. 28**

And

Case 29-CB-214675

HOWARD BIRNS, an Individual

And

UNITED SHEET METAL CORP.

**COUNSEL FOR GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I.	PROCEDURAL HISTORY OF THE CASE	1
II.	SUMMARY OF THE DISPUTE	2
III.	FACTS.....	3
A.	BACKGROUND FACTS	3
1.	The Employer’s Business Operations	3
2.	The Empire Outlets Jobsite	3
3.	The Employer’s Engagement in Interstate Commerce	4
4.	Foreman Birns and the Rest of the Unit.....	5
5.	Respondent and its Actors.....	6
B.	MATERIAL FACTS	9
1.	The Employer Decides to Layoff executive Board Member and Shop Steward Callahan	9
2.	Empire Outlets Kicks Callahan Off its Jobsite before Callahan’s Layoff Goes Into Effect	10
3.	Respondent Threatens Birns with Union Charges if Birns Doesn’t Get Callahan Back on the Empire Outlets Jobsite	11
4.	Respondent Refuses to Appoint a New Shop Steward After Callahan’s Termination	13
5.	Respondent, by Starace, Initiates Union Charges Against Birns	13
6.	Respondent Ignores Birns’ Request for Clarification Concerning the Union Charges.....	15
7.	Respondent Holds the Union Hearing Against Birns, Where Birns’ Expulsion, Loss of Employment and Potential Fines Are on the Line	16
IV.	ANALYSIS	19
A.	THE BOARD HAS JURISDICTION OVER THIS MATTER.....	20
B.	CREDIBILITY RESOLUTIONS	21
1.	General Counsel’s Witnesses Should Be Credited	22
2.	Respondent’s Witnesses Should Be Discredited.....	25
C.	CASES INVOLVING UNION DISCIPLINE CAN VIOLATE SECTION 8(B)(1)(A) OF THE ACT	31
D.	RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY INITIATING AND PROCESSING UNION CHARGES AGAINST HOWARD BIRNS	36
1.	Birns Engaged in Activity Protected Under Section 7 of the Act when He Refused to get Callahan his Job Back.....	38

2.	Respondent Learned of Birns' Protected Activity as Soon as Birns Refused to get Callahan his Job Back	39
3.	Respondent Initiated and Processed Union Charges Against Birns In Retaliation for His Protected Activity	40
4.	Respondent Did Not Have a Legitimate Basis to Initiate and Process Union Charges Against Birns	42
5.	Respondent Failed to Produce Any Evidence that it Would Have Brought Birns up on Union Charges Even if Birns Had Not Refused Respondent's Directive to Try to Get Callahan Back at Work	42
E.	RESPONDENT'S DEFENSES FAIL	43
1.	Respondent's Business Representative Salvatore Starace Was an Agent of Respondent within the Meaning of Section 2(13) of the Act, who Acted as Respondent's Agent with Actual and Apparent Authority When he Initiated and Processed Union Charges Against Birns	43
2.	Respondent's Failure to Impose a Penalty Against Birns Does Not Preclude Your Honor from Finding a Violation in this Matter	48
3.	The Complaint States a Claim under Which Relief Can be Granted, and Sufficiently Places Respondent on Notice of the Allegations Alleged.....	49
V.	CONCLUSION	52

TABLE OF CASES

<i>Adco Electric,</i> 307 NLRB 1113 (1992)	37
<i>Allright New York Parking, Inc.,</i> 180 NLRB 757 (1970).....	20
<i>Auto Workers Local 1989 (Caterpillar Tractor Co.),</i> 249 NLRB 922 (1980).....	32
<i>Douglas Division,</i> 228 NLRB 1016 (1977).....	48
<i>Electrical Workers IBEW Local 34 (Protection Alarms),</i> 208 NLRB 639 (1974).....	32
<i>Electronic Data Systems Corp.,</i> 305 NLRB 219 (1991).....	37
<i>F. Bolin Co.,</i> 311 NLRB 1118 (1993).....	37
<i>Flexsteel Industries,</i> 316 NLRB 745 (1995).....	24
<i>Fluor Daniel, Inc.,</i> 304 NLRB 970 (1991).....	37
<i>Franconia Paper Mills, Inc.,</i> 111 NLRB 773 (1955).....	20
<i>Gerig's Dump Trucking,</i> 320 NLRB 1017 (1996).....	23, 28
<i>Hausner Hard-Chrome of Ky, Inc.,</i> 326 NLRB 426 (1998).....	43, 44
<i>Highway, City and Freight Drivers, Local,</i> <i>Union. 600 (Commercial Lovelace, et al.),</i> 250 NLRB 1127 (1980).....	38
<i>In Re Brewery, Soda & Mineral Water Bottlers of California, Local Union No. 896, Int'l Bhd. of</i> <i>Teamsters, Afl-Cio,</i> 339 NLRB 769 (2003).....	33

<i>In re Textile Processors,</i> 332 NLRB 1352 (2000).....	32
<i>International Automated Machines,</i> 285 NLRB 1122 (1987).....	23, 28
<i>International Brotherhood of Electrical Workers Local 2321 (Verizon),</i> 350 NLRB 258 (2007).....	32
<i>Local 121,</i> 264 NLRB 192 (1982).....	36
<i>Longshoremen ILA (Coastal Stevedoring Co.),</i> 313 NLRB 412 (1993).....	44
<i>Machinist 707 (United Technologies),</i> 276 NLRB 985 (1985).....	32, 33, 34, 38
<i>N.L.R.B. v. Dist. Council of Iron Workers of the State of Cal. and Vicinity,</i> 124 F.3d 1094 (9th Cir. 1997).....	44
<i>N.L.R.B. v Local 485, International Union of Electrical Workers,</i> 454 F .2d 17, fn. 6 (1972).....	38, 39
<i>National Licorice Co. v. NLRB,</i> 309 U.S. 350 (1940)	50
<i>Nickles Bakery of Indiana,</i> 296 NLRB 927 (1989).....	50
<i>NLRB v. Fant Milling Co.,</i> 360 U.S. 301 (1959)	50
<i>Office Employees Local 251 (Sandia National Laboratories),</i> 331 NLRB 1417 (2000).....	31, 32
<i>Overnite Transportation,</i> 329 NLRB 990 (1990).....	23, 28
<i>Passavant Memorial Hospital,</i> 237 NLRB 138 (1978).....	48
<i>PCC Structurals, Inc.,</i> 330 NLRB 868 (2000).....	44

<i>Plumbers Local 13 (Mechanical Contractors Assn.),</i> 212 NLRB 477 (1974).....	32
<i>Redd-I, Inc.,</i> 290 NLRB 1115 (1988).....	50
<i>Service Employees Local 254 (Brandeis University),</i> 332 NLRB 1118 (2000).....	33
<i>Siemons Mailing Service,</i> 122 NLRB 81(1959).....	20
<i>Southern Bag Corp.,</i> 315 NLRB 725 (1994).....	44
<i>Steelworkers Local 1397 (United States Steel Corp.),</i> 240 NLRB 848 (1979).....	38
<i>Teamsters General Local Union No. 200,</i> 357 NLRB 1844 (2011).....	36, 37, 38
<i>Transportation Management Corp.,</i> 462 U.S. 393 (1983)	37
<i>Wright Line, a Division of Wright Line, Inc.,</i> 251 NLRB 1083 (1968).....	36

I. PROCEDURAL HISTORY OF THE CASE

Based on the February 12, 2018 unfair labor practice charge filed by Charging Party Howard Birns, against the International Association of Sheet Metal, Air, Rail and Transportation Workers Local Union No. 28, (“Respondent” or “the Union”), on May 31, 2018, the Regional Director of Region 29 issued a Complaint and Notice of Hearing (“Complaint”) in Case No. 29-CB-214675. The Complaint alleges that Respondent violated Section 8(b)(1)(A) of the Act by filing and processing internal Union disciplinary charges (“Union charges”) against Birns because Birns refused to use his position as foreman to persuade United Sheet Metal Corp. (“United Sheet Metal”) to rehire Respondent’s Shop Steward and Executive Board Member James Callahan.

The case was litigated before Administrative Law Judge Kenneth Chu on September 18, and October 11, 2018 in Brooklyn, New York. Counsel for the General Counsel (the “General Counsel”) called three witnesses to testify: Joseph Grgas, Director of United Air Conditioning Corp., the parent company of the Employer; Charging Party Birns; and employee Ian Elms. Respondent called three witnesses to testify—Salvatore “Sal” Starace, Respondent’s Business Representative; Thomas Gallagher, Respondent’s Vice President and Chairman of Birns’ Union disciplinary hearing; and James “Jimmy” Cuiffo, Respondent’s Recording Secretary, Financial Secretary-Treasurer, Executive Board member, and a committee member of Birns’ Union disciplinary hearing. Respondent’s Callahan did not testify at the hearing.

II. SUMMARY OF THE DISPUTE

This case involves whether Respondent violated Section 8(b)(1)(A) of the Act by initiating and processing internal Union disciplinary charges against Charging Party Howard Birns because he refused to accede to Respondent's demand that Birns use his position as foreman to persuade the Employer to rehire Shop Steward and Executive Board Member James Callahan.

By its Answer and a motion to dismiss complaint, Respondent argues that the Board does not have jurisdiction to find a violation in this matter and that the Complaint fails to state a claim for which relief can be granted. Additionally, Respondent denies that Starace is an agent of Respondent, and that Starace initiated and processed Union charges against Birns in his official capacity as Respondent's Business Representative. Therefore Respondent contends it may not be held responsible for Starace's conduct. Respondent also argues that since Respondent ultimately dismissed the Union charges against Birns and did not reprimand Birns, it did not violate the Act.

III. FACTS

A. BACKGROUND FACTS

1. The Employer's Business Operations

United Air Conditioning Corp. ("United Air") is a parent company engaged in the manufacture, installation and service of heating, ventilation, and air conditioning systems ("HVAC systems"). It contains two divisions, each operating as separate corporate entities with separate tax identification numbers tasked with the responsibility of performing work contracted to the United Air business. [Tr. 245-246].

United Sheet Metal Corp., a New York domestic corporation, is one division of United Air and is responsible for installing HVAC systems on behalf of United Air. [Tr. 246-248]. United Service Corp. is a separate corporation which operates as the second division of United Air and is responsible for repairing HVAC systems on behalf of United Air. [Tr. 246]. United Sheet Metal and United Air each maintain a corporate office located at 27-20 Skillman Avenue, Long Island City, New York. [GC Exh. 2, 16, 17].

United Sheet Metal is a member of the Sheet Metal & Air Conditioning Contractors Association of New York City, Inc. and SMACNA of Long Island, Inc., an employer association which maintains a collective bargaining relationship with the Respondent Union. [Tr. 247; Jt. Exh. 5]. United Sheet Metal and Respondent (collectively "the Parties") are parties to a collective bargaining agreement that was effective from August 1, 2014 to July 31, 2017. [*Id.*].

2. The Empire Outlets Jobsite

Under the collective bargaining agreement, Respondent represents the HVAC journeypersons, and apprentices employed by United Sheet Metal. [*Id.*].

At some point in or around 2015 or 2016, United Air entered into a contract on behalf of United Sheet Metal to provide installation HVAC services (“the Sub-Contract”) to the owners of the Empire Outlets at the Empire Outlets jobsite located at 55B Richmond Terrace, Staten Island, New York (“the Empire Outlets jobsite”). [Tr. 30, 255]. The Empire Outlets jobsite is a new construction jobsite on an approximately eight (8) acre lot of land in Staten Island that is being developed as an outlet mall. [Tr. 30-31]. Upon completion, the outlet mall will consist of over 100 stores and restaurants. [*Id.*]. On a day to day basis, anywhere from about 300 to 600 construction workers perform work on the Empire Outlets jobsite. [Tr. 31].

Consistent with the SubContract, United Sheet Metal agreed to fulfill the terms of a Project Labor Agreement (the “PLA Agreement”) entered into between the owners/developers of the Empire Outlets jobsite, the site’s general contractor, and the Building & Construction Trades Council of Greater New York, including Respondent. [Tr. 255-256].

Pursuant to the SubContract, United Sheet Metal supplies Local 28 manpower to perform the HVAC installation work on the Empire Outlets jobsite and compensates those employees on the jobsite. [Tr. 254; GC Exh. 2].

3. The Employer’s Engagement in Interstate Commerce

While United Sheet Metal supplies the manpower for the Empire Outlets jobsite, United Air, purchases and receives at the Empire Outlets jobsite, goods and materials valued in excess of \$50,000 directly from suppliers directly outside the state of New York, which are installed at the Empire Outlets jobsite by United Sheet Metal’s Local 28 workforce. [GC Exh. 14 & 15]. In particular, during 2016 and 2017, United Air purchased and received at the Empire Outlets jobsite good and materials from Analytical & Combustion Systems, located in New Milford, CT

and Mechanical Technologies, located in Pine Brook, New Jersey valued in excess of \$50,000. [GC Exh. 14 and 15].

4. Foreman Birns and the Rest of the Unit

Charging Party Birns has been a union member in good standing with Respondent since about 1989. [Tr. 41]. Since about April 2016, to the date of the hearing, Birns worked for the Employer as the foreman on the Empire Outlets jobsite. [Tr. 29-30]. Birns testified that at various dates during his time as foreman on the Empire Outlets jobsite, he worked with apprentice Ian Elms, shop steward and Executive Board Member James Callahan, journeypersons Matin Semsik, and Robert Rosario, among others. [GC Exhs. 4 & 11].

Mike DeStiffano was one of Birns' direct supervisors. [Tr. 31]. DeStiffano, as outside supervisor, was responsible for overseeing the Local 28 manpower on the jobsite, and the amount of work performed every day. DeStiffano also attended coordination meetings and placed equipment orders for the jobsite. [Tr. 33, 39-40]. DeStiffano also walked the jobsite, and monitored employees' work progress. [Tr. 40].

Ozzy Basrudin was also Birns' direct supervisor. Basrudin was responsible for processing the Employer's payroll, moving around men on the job or among different jobsites where necessary, based on the importance of the job, and managing scheduling. [Tr. 41].

As foreman on the Empire Outlets jobsite, Birns testified that he is responsible for installing HVAC and related material and overseeing the journeypersons and apprentices who were perform the same work. [Tr. 30]. Birns also testified that he was also responsible for attending daily and weekly coordination meetings on the jobsite with superintendents DeStiffano and Basrudin, the site owners, and other general contractors, informing the superintendent of any issues, keeping logs of employee attendance, coordinating safety talks with employees,

coordinating with the Employer to order materials, staying current with blueprint changes, and assigning tasks to team members. [Tr. 32-33]. Birns testified that he does not hire or fire employees, and testified that owner Joseph Grgas is the only one who may hire and fire employees [Tr. 69, 130]¹.

5. Respondent and its Actors

a) *Executive Board Member and Shop Steward James Callahan*

James “Jimmy” Callahan worked at the Employer’s Empire Outlets jobsite as a journeyman from May to June 2017. [Tr. 44-45]. On or about May 23, 2017, Respondent appointed Callahan as the shop steward of the Empire Outlets jobsite. As shop steward, Callahan identified safety issues on the job site and reported them to Respondent’s Business Representative Salvatore “Sal” Starace. [Tr. 45; Jt. Exh. 8].

Callahan is also a member of Respondent’s Executive Board (“E-Board member”). [Tr. 16, 42, 44]. Respondent’s Constitution and Bylaws (“Respondent’s Constitution”) set forth the duties and responsibilities of Respondent’s Executive Committee, which include supervising the work of Respondent, its officers, business agents and other employees, receiving reports and filing grievances.² [Jt. Exh. 6 Art. VI p. 16-17]. Contrary to the testimony of Respondent’s Cuiffo, Starace and Gallagher, who each testified that their powers as Respondent’s union officials derive from the Constitution and Ritual of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“the SMART Constitution”), the SMART Constitution makes clear that the duties and responsibilities of the Local Union Executive Board are dictated by the SMART Constitution only insofar as “those local unions . . . *do not adopt by-laws of their own.*” [Jt. Exh. 2, Art. X, Sec. 5 p. 54]. Respondent’s Cuiffo conceded that Respondent has

¹ Respondent does not contend that Birns is a 2(11) supervisor under the Act.

its own by-laws, as reflected in Respondent's Constitution, and that Respondent's Constitution remains in effect. [Tr. 141].

Consistent with Respondent's Constitution, Callahan was elected as an E-Board member for three consecutive three year terms over the past eight years. [Tr. 185]. His most recent appointment is scheduled to end in June 2019.

Respondent's Constitution in no way requires that the Executive Committee hear Union charges, and instead grants the Executive Committee with the discretion to adopt its "own rules of procedure which shall in no way conflict with . . . the [SMART] Constitution[.]" [Jt. Exh. 6 Art. VI p. 16].

b) *Business Representative Salvatore "Sal" Starace*

Salvatore "Sal" Starace is a Business Representative for Respondent, and has paid dues to Respondent since about 1995. [GC Exh. 18]³. As set forth in Respondent's Constitution, as a business representative, Starace is responsible for settling all disputes between employers and employees, and reporting those disputes, making reports of the work performed during the week, and attending all Executive Committee meetings. [Jt. Exh. 6 Art. IX p. 19-21]. Pursuant to Respondent's Constitution, Starace is unable to vote at any of the meetings. [*Id.* at 20-21]. Under Respondent's Constitution, business representatives are also required to prefer charges on the foreman of the shop or job where they find "deliberate violations of any of the rules of [Respondent]." [*Id.* at 19-20]. For the past four years, Starace has exercised his duties as Business Representative while overseeing the CBA Respondent maintains in workplaces throughout Staten Island. [Tr. 191-192]. In particular, Starace served as Respondent's business

³ General Counsel hereby moves to include GC Exh. 18 into the record. GC Exh. 18 is relevant to Starace's alleged standing as a member of Respondent, and bears on whether Starace acted in his personal or official capacity when he initiated and processed Union charges against Birns. GC Exh. 18 was provided to the General Counsel on October 12, 2018, after the hearing in this matter concluded.

representative for the Empire Outlets jobsite in 2017 during the time of Callahan's service there as shop steward. [Tr. 193].

Starace admitted that he never worked as a laborer performing subcontract work for Respondent. [Tr. 191]. In Starace's application for membership to the International Union, Starace does not specify an Employer or local union number with which Starace is affiliated. [GC Exh. 18]. Moreover, Starace's application does not bear a seal from the International Union of its recognition of his membership, nor an initiation date. [*Id.*]. No national official signed Starace's membership. John Harrington, Respondent's Financial Secretary-Treasurer at the time is the only official who signed it. [*Id.*]

Under the SMART Constitution, to be a member of the Union, one must "be a worker in one or more industries covered by the jurisdictional claims of the International [Union]." [Jt. Exh. 2 Art. XVI p. 78].

c) ***Recording Secretary, Financial Secretary-Treasurer and
Executive Board Member James "Jimmy" Cuiffo***

James "Jimmy" Cuiffo is a 38 year member of Respondent and for the past 8 years he has held the elected positions of Respondent's financial secretary-treasurer and recording secretary. [Tr. 138]. Similar to the business representative position, Cuiffo's authority, duties and responsibilities are derived from and set forth in Respondent's Constitution, contrary to Cuiffo's testimony that the SMART Constitution controls. [GC Exh. 6 Art. V p. 9-10; Tr. 141]. Cuiffo testified that he is solely responsible for scheduling the date and time of all Union hearings, including the Union hearing related to Birns' Union charges, and that he has an assistant, who helps him fulfill this responsibility. [Tr. 139]. Cuiffo admits that he received Birns' correspondence seeking clarification about Birns' Union charges, but did not seek the

clarification Birns sought from Starace or provide Birns' with any substantive clarification concerning the Union charges. [Tr. 102; 169-174].

d) *Vice President, Vice-Chairman of the Executive Board, Internal Union Disciplinary Chairman Thomas Gallagher*

Thomas Gallagher has been a member of Respondent for over 33 years, and for the past two years, Gallagher has served as Respondent's Vice President, and Vice-Chairman of the Executive Board. [Tr. 42, 144, 162-163, 175; Jt. Exh. 6 Article 5 Sect. 2 p. 8-9]. He also served as the Chairman for Respondent's internal Union hearing against Birns. Similar to Respondent's business representative, recording secretary, and financial secretary treasurer positions, Gallagher's powers as Vice President and Vice Chairman are derived from Respondent's Constitution. [*Id.*]. Nothing in Respondent's Constitution requires Gallagher to serve as Chairman of Respondent's Union hearings. [*Id.*].

B. *MATERIAL FACTS*

1. The Employer Decides to Layoff executive Board Member and Shop Steward Callahan

In late June of 2017, over the course of several days, United Sheet Metal reduced its then Local 28 workforce at the Empire Outlets jobsite from about 14 employees to about 4 employees. [Tr. 195]. The workforce on the Empire Outlets jobsite customarily fluctuated up and down based on changes in the workload on the jobsite. [Tr. 216]. Birns testified that on or about June 21, 2017, he learned from Superintendent Basrudin that James Callahan was scheduled for layoff on or about June 26, 2017. [Tr. 46-47]. According to Birns, he had a conversation with Superintendents DeStiffano and Basrudin about the need to reduce staffing due to a lack of work. [Tr. 47]. Later on, Birns reported receiving a call from Basrudin asking for Callahan's hours and informing Birns that United Sheet Metal planned to lay off Callahan.

[Tr. 49]. According to Birns, no other employees were laid off on the day that Basrudin called Birns to ask about Callahan. [Tr. 50].

United Sheet Metal notified Respondent of its decision to lay off Callahan on June 21, 2017, three days in advance of the effective date of Callahan's layoff on June 26, 2017. [Tr. 48].

2. Empire Outlets Kicks Callahan Off its Jobsite before Callahan's Layoff Goes Into Effect

On June 26, 2017, before Callahan's layoff became effective, Empire Outlets kicked Callahan off its Empire Outlets jobsite. [GC Exh. 7].

Birns testified that on the morning of June 26th, Starace scheduled a 12:30p.m. safety talk with the Local 28 workforce on the Empire Outlets jobsite. Birns' attendance sheet for that day confirms that Callahan, Elms, and Birns were present at the Empire Outlets jobsite on June 26, 2017, and a text message exchange between Birns, Starace and Callahan confirm that Starace scheduled a safety talk with employees for June 26, 2017 at 12:30p.m. [GC Exh. 3 & 11].

Birns testified that during his lunch break, while he was with employee Manuel Rodriguez, Empire Outlet Safety Director Anthony Castellano and Site Superintendent Billy Crothfield approached Birns and reported that Callahan was seen drinking at a bar during lunch. [Tr. 51-52]. Birns further testified that Crothfield also reported that Callahan had also been seen in the bar during lunch the prior week. [Tr. 52]. According to Birns, Castellano and Crothfield asked Birns to report to the turnstile, the access point where employees enter into the jobsite, in order to confront Callahan; Birns agreed. [*Id.*].

Birns testified that he waited for Callahan to approach the turnstile along with Crothfield, Castellano, Empire Outlets Owner Ann Capocia, apprentice Ian Elms, and Rodriguez. [Tr. 53-54]. Birns testified that Starace approached the turnstile while everyone waited for Callahan or shortly after the exchange began. [Tr. 54, 56]. Callahan approached the turnstile at about

12:25p.m. He tried to gain access to the jobsite, but his access card had been disabled. Castellano confronted Callahan about drinking at the bar during lunch. [Tr. 54-56]. Birns described in detail the back and forth conversation between Callahan and Castellano. [Id.]. Birns testified that Starace asked what was going on, and Castellano explained that Callahan was seen drinking at the bar. [Tr. 57]. Castellano and Callahan continued to argue, which elevated to screaming.

Birns testified that Callahan then turned to Birns and called Birns a disgrace to the Union and a scumbag. Callahan threatened Birns “it wasn’t over yet” and that Birns “had done this”. [Tr. 58]. Birns further testified that as Callahan left the Empire Outlets jobsite, Starace said that he knew “it was [Birns who caused Callahan to be removed]!” [Tr. 58]. The safety meeting scheduled for 12:30 p.m. didn’t happen. [Tr. 60-61].

Birns recalled apprentice Ian Elms being present during Callahan’s removal but explained that Elms was behind him, although he believed Elms heard everything that happened in the exchange. [Tr. 54].

Starace admitted to being present during Callahan’s removal from the Empire Outlets jobsite, but he failed to testify in any detail about the exchange, offering only an unsubstantiated general denial that he did not tell Birns “it was you”. Starace did not deny that Callahan called Birns a scumbag and a disgrace to the Union, and threatened Birns that it wasn’t over yet.

3. Respondent Threatens Birns with Union Charges if Birns Doesn’t Get Callahan Back on the Empire Outlets Jobsite

Birns testified that on June 27, 2017, the day after Callahan and Starace accused Birns of getting Callahan fired, Starace called for Birns to hold the toolbox meeting and safety talk. [Tr. 62]. Birns recalled that Ian, Matin, Callahan and Rob were present for the meeting, which was held in front of the supreme courthouse within walking distance of the jobsite. Although

Callahan had been fired from the jobsite the day before, Birns testified that he believed Callahan returned to the jobsite on the 27th to reclaim his tools. [Tr. 64]. Birns' attendance sheet for the day confirmed Callahan's attendance at the toolbox meeting and safety talk on June 27th. [GC Exh. 4]. During the hour-long toolbox meeting, Starace led the meeting and covered 10 toolbox talks, and safety concerns on the jobsite. Birns testified that during the toolbox meeting, Starace also told the group that Callahan was not being allowed to work and that Respondent was filing a grievance to get Callahan his job back. [Tr. 62-63].

Birns further testified that after the meeting, on the walk back to the Empire Outlets jobsite, Starace threatened Birns to either get Jimmy back on the jobsite, or Respondent would bring Birns up on charges. [Tr. 67]. Birns replied that it was not up to him to hire or fire people and that the decision to hire and fire was "up to the owner, Joe. If Joe hires him back, I have no problem with bringing Jimmy back[.]" [Tr. 67-68].

Apprentice Ian Elms corroborated Birns' testimony regarding the toolbox talk and safety meeting held the day after Callahan's removal from the jobsite. He recalled that the meeting was held at the courthouse, and that the meeting lasted at least thirty minutes or so during the morning. [Tr. 22]. Elms further recalled that the meeting occurred either the day of or the day after Callahan's removal from the jobsite. [Tr. 22-23]. Elms testified that while he was not directly a part of Birns' conversation with Starace, he specifically heard Starace threaten Birns if "he did not bring Jimmy back, he'd be brought up on charges." [*Id.*]. Elms testified that he remembered the statement because it left him in shock. [Tr. 22].

Birns further testified that he received multiple phone calls from Starace in which Starace repeatedly threatened that if Birns did not get Callahan back on the jobsite, Starace would bring Birns up on charges [Tr. 67-69]. During these phone calls from Starace, Birns reiterated that he

didn't make the decision to hire or fire employees. [*Id.*]. During Starace's subsequent threats Birns again explained "it's not up to me." [*Id.*].

4. Respondent Refuses to Appoint a New Shop Steward After Callahan's Termination

In the days following Callahan's removal from the Empire Outlets jobsite, Respondent refused to appoint another shop steward, despite having enough Local 28 workers on the Empire Outlets jobsite to warrant a new shop steward's appointment. [GC Exh. 5, Tr. 118, 198, 222]. Under the collective bargaining agreement, a shop steward should be assigned to a jobsite after five or six employees, excluding the foreman, were present. [Jt. Exh. 5, Tr. 70; 221]. Birns testified that on July 25, 2017, he texted Starace "need a shoppie" because the Empire Outlets jobsite had 10 men. [*Id.*]. Starace replied via text, "We have a shoppie[.]" referring to Callahan. [*Id.*]. Despite the workforce numbers staying high enough to warrant assigning a shop steward, and the jobsite remaining unsafe, according to Starace, he withheld assigning a shop steward until November 2017. [Tr.221-222].

5. Respondent, by Starace, Initiates Union Charges Against Birns

Under Respondent's Constitution, Article IX, Section 3, Starace as a business agent has express authority to prefer charges against a foreman if the foreman deliberately violates "any of the rules of Respondent." [Jt. Exh. 6, Art. IX Sec. 3 p. 20].

Starace exercised his authority under Respondent's Constitution and carried out his threat against Birns, by letter dated August 7, 2017, when Starace brought Birns up on Union charges allegedly for a "sequence of events [which] took place between the dates of June 22-30, 2017, including allegedly placing Local 28 journeymen and apprentices in unsafe working conditions, and

“[f]urthermore, Howard proceeded to lower the amount of workers on the job site below the allotted number to retain a shop steward so he can lay off Jimmy. On Jimmy's final day, Howard went to the project manager and the job site safety coordinator and made up a story so that my shop steward would not be allowed to re enter the site, Jim Callahan's entry card was taken away. **Howard made our union and one of it's brothers look bad** when he could have come to me to address any issues he felt were not ok.”

[Jt. Exh. 1]. According to Starace, Birns’ alleged conduct violated Article XVII, Misconduct and Penalties, Sections 1(b), 1(c), 1(e), and 1(m) of the SMART Constitution, which specify the following:

SEC. 1(b). Refusal or failure to perform any duty or obligation imposed by this Constitution, the policies of this Association, the valid decision of any Officer or Officers thereof or the valid decisions of the General Executive Council or Convention or the valid rules and regulations of any local union or council. . . .

SEC. 1(c). Engaging in conduct at union or council meetings, or at other locations, that tends to or does interfere with, diminish, or destroy the ability of an officer, business manager, business representative, or member to perform legal, contractual or constitutional obligations on behalf of a local union or council or to discharge the duties of the office to which such individual was elected or appointed. . . .

SEC. 1(e). Violating the established union collective bargaining agreements and rules and regulations of any local union relating to rates of pay, rules and working conditions. . . .

SEC. 1(m). Engaging in any conduct which is detrimental to the best interests of this Association or any subordinate unit thereof or which will bring said unions into disrepute. [Jt. Exh. 2].

Section 25 of the CBA states, “[s]afe and healthy working conditions shall be observed at all times.” [Jt. Exh. 5].

6. Respondent Ignores Birns' Request for Clarification Concerning the Union Charges

Leading up to the Union hearing, which was rescheduled several times to ultimately February 28, 2018, [GC Exh. 6, Jt. Exh. 3, 4] Birns testified that Respondent repeatedly ignored his requests for additional detail about the Union charges issued against him.

Respondent, by Cuiffo ignored Birns' initial letter dated 1/9/2017 (sic) and email dated 1/10/2018 wherein Birns sought "point to point correlation to the prescribed charges specifically[.]" since the charges were vague and needed clarification. [Tr. 83-84, 86, GC Exh. 8 & 10].

After no response to his January 9 and 10th communications, Birns renewed his request to Cuiffo for clarification of the charges by email on February 12, 2018. [Tr. 83; GC Exh. 8]. Cuiffo only responded after Birns' February 12, 2018 email. By email dated February 12, 2018, Cuiffo requested a call with Birns. [*Id.*]. Although Birns spoke with Cuiffo, Cuiffo failed to provide Birns with additional clarification or seek additional clarification for Birns. [Tr. 166-169].

Cuiffo's failure to provide Birns with any additional clarification of the Union charges filed against him contravenes the requirements of the SMART Constitution, which entitles Birns to charges that "shall contain a specific statement of the facts out of which the charges arose and the duty or obligation including the sections of this Constitution alleged to have been violated," [Jt. Exh. 2 Art. XVIII, Sect.1 (b) p. 99].

Birns contacted the International Union's General President Joseph Sellers, explaining that Birns believed he was being brought up on charges for refusing to secure reemployment for shop steward James Callahan against Business Representative's Sal Starace's insistence. [GC

Exh. 9; Tr. 84-85]. Birns also informed Sellers that Respondent, by Cuiffo, failed to observe the SMART Constitution in scheduling Birns' hearing. [GC Exh. 9].

For example, despite the SMART Constitution requiring that a trial committee of three or more members of the local union or the Executive Board be *elected* by Respondent during a meeting or special meeting, to which Birns must be notified, Respondent failed to hold a meeting to provide Birns with the option to elect either a trial committee of three or more members of the local union or the Executive Board, to preside over Birns' Union hearing or notify Birns about the meeting where this election took place. [Jt. Exh. 2 Art. XVIII, Sec. 2(b) p. 100]. Cuiffo admitted that Respondent did not notify Birns about the meeting during which his Union hearing trial committee would be set because Cuiffo did not think that Birns needed to know. [Tr. 163]. Instead, Respondent just sent Birns its December 7, 2017 correspondence scheduling Birns' Union hearing for December 27, 2017. [Jt. Exh. 2].

Without any additional explanation about the point to point correlation of the Union charges, or notice and due process to elect the Union hearing trial committee set to hear his Union charges, Birns prepared his defense with only the information in Respondent's August 7, 2017 Union charges.

7. Respondent Holds the Union Hearing Against Birns, Where Birns' Expulsion, Loss of Employment and Potential Fines Are on the Line

On February 28, 2018, Respondent held its Union hearing against Birns. Birns testified that Respondent's Callahan, Starace, Cuiffo and Gallagher were present.

Birns testified that the Union charges were read aloud alleging Birns placed employees in unsafe working conditions and that Birns:

“ . . . proceeded to lower the amount of workers on the job site below the allotted number to retain a shop steward so he can lay off Jimmy. On Jimmy's final day, Howard went to the project manager and the job site safety coordinator and made up a story so

that my shop steward would not be allowed to re enter the site, Jim Callahan's entry card was taken away. ***Howard made our union and one of it's brothers look bad*** when he could have come to me to address any issues he felt were not ok.”

. [Tr. 91; Jt. Exh. 1]. At hearing, Starace contended that the Union charges against Birns did not relate in any way to Birns’ causing Callahan to be removed from the Empire Outlets jobsite, Birns’ failure to get Jimmy his job back, or the alleged constitutional violations Starace cited in the Union charges. [Tr. 207-208]. However, Starace did not deny Birns’ testimony that the charges were read in their entirety -- including allegations regarding allegedly causing Callahan’s termination -- during the Union hearing.

Birns testified that he learned that Respondent dismissed the Union charges against him via a letter he received in the mail, dated April 3, 2018. [Jt. Exh. 7; Tr. 92]. Starace testified that the Union charges were ultimately dismissed because of clerical errors in his Union charges. [Tr. 212]. Yet neither Cuiffo nor Gallagher testified at all about the deliberations surrounding Birns’ Union hearing or the ultimate reasons Respondent dismissed the Union charges against Birns, despite Cuiffo and Gallagher serving on the panel required to determine the outcome of Birns’ Union charges.

Respondent failed to present any testimonial or documentary evidence supporting its assertion that Birns placed employees in unsafe working conditions on the Empire Outlets jobsite. Starace admitted he never saw employees in the unsafe conditions he alleged existed in his Union charges. [Tr. 223]. Rather, Starace testified only to hearsay conversations he had with Callahan that formed Starace’s state of mind to issue Union charges against Birns. [Tr. 205-206].

While Starace accused Birns of placing members in the basement filled with 8ft of water in his Union charges against Birns, at hearing, Starace testified that Callahan told Starace that

Birns placed members down in the basement that contained four inches of water. [Jt. Exh. 1; Tr. 205-206].

At trial Starace further testified that Callahan told him that Birns placed apprentice Ian Elms into a cordoned off area to perform a crane pick without a harness, yet these accusations were not included anywhere in Starace's Union charges against Birns. [*Id.*].

Starace based his decision to issue Union charges against Birns solely on his purported conversations with Callahan. [Tr. 205-206]. Starace did not conduct an investigation into Callahan's assertions, had no first-hand knowledge of Callahan's accusations, and did not ask any other employees about the accusations to determine whether the accusations were true.

IV. ANALYSIS

The preponderance of the credible evidence adduced at trial irrefutably shows that Respondent initiated and processed Union charges against Birns because Birns refused Respondent's directive to get Callahan his job back.

The General Counsel introduced evidence that Respondent held animosity towards Birns because Respondent believed that Birns caused the Employer to layoff Callahan, and that Respondent believed that Birns had the power to cause the Employer to rehire Callahan but that Birns refused to exercise that purported power. The General Counsel also introduced evidence that Respondent threatened Birns with Union charges if Birns did not get Callahan his job back, subsequently initiated Union charges against Birns on August 7, 2017 after Birns failed to use his position as foreman to get Callahan rehired, and processed Union charges against Birns at a Union hearing on February 28, 2018 ("the Union hearing") for the same reasons. The record evidence also showed that Respondent's Representative Starace filed the Union charges against Birns in his capacity as Respondent's business representative, and an agent of Respondent under Section 2(13) of the Act.

Respondent failed to satisfy its burden, and failed to substantiate any of its asserted defenses, principally that 1) the Board lacks jurisdiction over this matter, 2) that the Complaint fails to state a claim under which relief can be granted, 3) that Respondent had a legitimate reason for initiating and processing Union charges against Birns 4) that Representative Starace acted in his personal capacity when filing and processing Union charges against Birns, 5) that Respondent failed to participate, authorize or ratify Representative Starace's illegal conduct, 6) that the International Union's SMART Constitution compelled Respondent to process the Union

charges against Birns, and that 7) Respondent did not commit a violation since it dismissed the Union charges against Birns and did not fine him.

A. THE BOARD HAS JURISDICTION OVER THIS MATTER

In its Answer, Respondent denies that it has the information to admit that United Sheet Metal engages in interstate commerce or that the Board has jurisdiction over this matter.

The evidence establishes that United Sheet Metal meets the Board's nonretail jurisdictional standard, which requires an annual outflow or inflow, direct, or indirect, across state lines of at least \$50,000 for the Board to assert jurisdiction over an entity. *Siemons Mailing Service*, 122 NLRB 81(1959). For purposes of asserting jurisdiction, parent companies and their subsidiaries operating as an integrated operation are treated as a single enterprise whose combined commerce operation must be considered in determining whether the Board asserts jurisdiction over a single subsidiary of the parent. *Franconia Paper Mills, Inc.*, 111 NLRB 773 (1955); *Allright New York Parking, Inc.*, 180 NLRB 757 (1970) (citing *Siemons*, 122 NLRB 81).

In that regard, at trial, Joseph Grgas, the Director of United Air, the parent company of United Sheet Metal, testified that United Sheet Metal operated as a division of United Air and was responsible for installing HVAC systems on behalf of United Air. The evidence establishes that the two share a corporate headquarters. United Air and United Sheet Metal are therefore operating as an integrated operation and should be treated as a single enterprise for the purpose of asserting jurisdiction.

Grgas further testified to and introduced into the record United Air's invoices received and checks issued for equipment it purchased on behalf of United Sheet Metal to be installed at the Empire Outlets jobsite. In particular, during 2016 and 2017, United Air made purchases and received at the Empire Outlets jobsite good and materials from Analytical & Combustion

Systems, located in New Milford, CT and Mechanical Technologies, located in Pine Brook, New Jersey valued in excess of \$50,000 each. Collectively, these invoices establish a direct inflow of goods across state lines of over \$100,000.

Accordingly the Board should assert jurisdiction in this matter.

B. CREDIBILITY RESOLUTIONS

As demonstrated above, your Honor may find a violation in the instant matter. Therefore, in order to evaluate the relevant facts and to determine what weight to give witnesses' testimony, your Honor must make credibility resolutions of the testimony presented at hearing.

The record evidence clearly demonstrates that General Counsel's witnesses testified in a very detailed, consistent, and forthright manner throughout the trial. They were credible witnesses who each made a sincere effort to provide your Honor with an honest recollection of what happened and what was said at each critical event. None was evasive nor gave contradictory statements on direct or cross examination. Rather, their testimony was mutually corroborative regarding all material facts. In this regard, Birns and apprentice Elms each testified that Respondent's representative Starace threatened that if Birns refused to get shop steward and Executive Board Member Callahan his job back, he'd be brought up on charges.

In addition, General Counsel's witnesses' testimony about when the threats took place and who was present for them, and Respondent's failure to afford due process to Birns while processing his Union charges is supported by record evidence in this case, including emails, sign in books, and correspondence to other parties.

In stark contrast, Respondent witnesses' testimony was self-serving, internally inconsistent, vague, implausible, and/or contradicted by the probative documentary evidence. In fact, the testimony of Respondent's key witnesses regarding seemingly straight forward areas

such as the source of their power as officers and officials of Respondent was completely belied by Respondent's own institutional documents. Moreover, during critical areas of testimony, like the threats Starace issued toward Birns, Respondent's witnesses issued curt denials or simply failed to testify at all. Thus, where there is a factual dispute, General Counsel's witnesses must be credited and Respondent's witnesses must be discredited.

1. General Counsel's Witnesses Should Be Credited

a) *Howard Birns' Testimony Was Consistent, Detailed and Should be Credited*

Howard Birns testified for a majority of the first day in this proceeding. Throughout his testimony on direct examination, cross examination and rebuttal, Birns provided forthright, responsive testimony to questions from the General Counsel, Respondent's counsel and the Administrative Law Judge. Moreover, Birns' testimony was detailed and consistent throughout the proceeding.

In addition, much of Birns' testimony was unrebutted by Respondent. For instance, Birns' crucial testimony that Executive Board Member and shop steward James Callahan threatened Birns that "this wasn't over, you wait," was unrebutted by Respondent.

Respondent also failed to rebut Birns' testimony that he did not place members in unsafe working conditions. Callahan purportedly witnessed the unsafe conditions that Birns placed employees in, and Respondent claimed that Callahan's alleged knowledge of these conditions supported its decision to issue Union charges against Birns. Without presenting Callahan's testimony, Birns' account that he did not place employees in unsafe working conditions should be credited and the absence of Callahan's testimony warrants the drawing of an adverse inference, that had he testified his testimony would not have supported Respondent's position that Callahan witnessed Birns placing employees in unsafe working conditions, and that

Respondent therefore had a legitimate business reason for issuing Union charges against Birns. *Gerig's Dump Trucking*, 320 NLRB 1017, 1024-1025 (1996); *Overnite Transportation*, 329 NLRB 990, 1014 (1990); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

In addition, Respondent's Business Representative Salvatore Starace did not deny or contradict Birns' testimony that Callahan threatened Birns when Callahan was removed from the Empire Outlets jobsite, although Starace admitted that he was present during Callahan's removal. Starace also failed to rebut Birns' testimony that Starace held the toolbox meeting and safety talk which precipitated Starace's threats against Birns to get Jimmy's job back or be brought up on charges. Moreover, Starace failed to specifically rebut Birns' testimony about Starace's repeated threats against Birns during Callahan's removal, following the toolbox meeting and safety talk, and via phone calls immediately following Callahan's removal. Instead, Starace offered a general denial that on or about the day of June 26th, 2017 he did not tell Birns that he he didn't bring Jimmy back, Birns would be brought up on charges. Here, adverse inferences should be drawn against Starace, and Birns' testimony concerning Starace's threats toward Birns to get Jimmy his job back or be brought up on charges should be credited. *Gerig's Dump Trucking*, 320 NLRB 1017, 1024-1025 (1996); *Overnite Transportation*, 329 NLRB 990, 1014 (1990); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Respondent might argue that Birns' testimony should not be credited since portions of his testimony concerning when Callahan obtained his tools were altered. However, this argument should fail. First, these facts are immaterial. Second, Birns self-corrected his testimony after he reviewed a newly introduced exhibit and his recollection was refreshed about the timing surrounding when Callahan obtained his tools. Prompting from counsel was not involved. In this case, Birns consistently recalled material facts, in particular, those concerning the threats

Starace made toward him. Given the length of time that has passed between Callahan's removal from the Empire Outlets jobsite in June 2017, to Birns' testimony at hearing in September 2018, it's plausible that Birns memory concerning the ancillary facts surrounding Callahan's removal may be indistinct. Moreover, Respondent's silence on this fact provides no alternative view on what happened during Callahan's removal; accordingly, Birns' testimony should be credited.

b) *Ian Elm's Testimony Was Consistent, and Should be Credited*

Apprentice Ian Elms provided forthright, responsive testimony to questions from the General Counsel, Respondent's counsel and Judge Chu based on his best recollection of the events, which occurred nearly 1 ½ years prior to the hearing date. Elms also made a sincere effort to provide as detailed testimony as possible, while visibly showing uneasiness with testifying openly against Respondent, while Respondent's Starace observed Elm's testimony in the hearing room. And although Elms failed to recall immaterial details surrounding the substance of the toolbox meeting's discussion, he specifically recalled Starace threatening to bring Birns up on Union charges if Birns didn't get Callahan his job back; Elms' testimony that he remembered this threat because it left him in shock is eminently believable. Insofar as Elms' testimony was forthright, and responsive, and Elms is a current union member and he testified adversely to Respondent's pecuniary interests, his testimony should be deemed particularly reliable. See *Flexsteel Industries*, 316 NLRB 745 (1995) affd. 83 F.3d 419 (5th Cir. 1996).

Furthermore, like Birns' testimony, much of Elms' testimony was not specifically rebutted by Respondent's Starace. In particular, although Elms testified that the safety and toolbox meeting occurred and that Starace threatened Birns to get Callahan back or be brought up on charges, Starace did not rebut this testimony with a specific denial. He only offered a general denial. Here, an adverse inference should be drawn against Starace, and Elms' testimony, particularly that Staraced threatened Birns, should be credited.

c) ***Joseph Grgas' Testimony Was Forthright and Detailed and Should be Credited***

Throughout his testimony on direct examination, Joseph Grgas provided forthright, responsive testimony to questions from the General Counsel and the Administrative Law Judge concerning United Sheet Metal's organizational structure, shipping and receiving equipment at the Empire Outlets jobsite, and related equipment invoices and checks. Grgas also testified about his lack of involvement with Respondent about Callahan's removal from the Empire Outlets jobsite. Specifically, Grgas admitted to receiving notice from general contractor Empire Outlets about Callahan drinking on the job and being removed from the Empire Outlets jobsite, but denied ever speaking with anyone from Respondent concerning Callahan's removal from the jobsite, in contradiction with Starace's statement that he spoke with Grgas about getting Callahan back on the Empire Outlets jobsite after Callahan's removal.

In this regard, Grgas' testimony was clear, detailed and consistent throughout the proceeding. As a neutral witness, who maintains no interest in the outcome of this matter, Grgas' testimony should be credited.

2. Respondent's Witnesses Should Be Discredited

The testimony presented by Respondent's witnesses was self-serving, vague, conclusory, and wholly unsupported by the record. Moreover, Respondent's witnesses failed to corroborate one another on critical points, and a great deal of the testimony elicited from them came after Respondent's counsel asked leading questions. Therefore, Respondent's witnesses' testimony is not worthy of belief and should not be credited.

Respondent's Business Representative Salvatore Starace, Recording Secretary and Financial Secretary Treasurer James Cuiffo, and Vice President Thomas Gallagher each testified about their duties and responsibilities as Respondent's elected officials. They also testified

without further explanation that the International Union's SMART Constitution confers upon them their power and duties as local union officers, and that the International Union's SMART Constitution somehow superseded Respondent's Constitution without further explanation. This testimony, however, is wholly inconsistent with and contradicted by the plain language of the SMART Constitution and Respondent's Constitution. The SMART Constitution makes clear that the duties and responsibilities of a local union's officers are only controlled by the SMART Constitution where the local union has not adopted its own by-laws. However here, Respondent's Cuiffo admitted that Respondent has its own Constitution and By-laws which currently remain in effect, the General Counsel introduced Respondent's Constitution into the record, and Respondent failed to present any evidence demonstrating that Respondent's Constitution was no longer in effect. Furthermore, Respondent's Constitution, including its outline of the voting process for Respondent's officers and officials, and the descriptions of the job duties, and authority of its officers and officials were in direct support of the actual job duties and authorities Respondent's witnesses admittedly exercised.

The source of Starace's powers as Respondent's business representative is critical here, insofar as Respondent denies Starace acted as an agent when initiating and processing Union charges against Birns, and the plain language of Respondent's Constitution undercuts Respondent's agency denial since it gives business representatives the express authority to issue charges against a foreman for deliberate violations of union rules.

Here, Starace, Cuiffo, and Gallagher each showed their propensity to provide self-serving testimony rather than forthright testimony related to the governing documents which provided each of them with their powers as local Union officers and officials. Respondent's Cuiffo admitted that Respondent's Constitution was still effective, the plain language of Respondent's

Constitution serves as the best evidence of Respondent's witnesses' duties and responsibilities and the governing authority of their powers. Accordingly, Respondent's witnesses' testimony that their powers derive from the SMART Constitution should be discredited.

a) *Salvatore Starace Should Be Discredited*

Representative Starace generally testified about his interactions with Birns as the foreman for the Empire Outlets jobsite, Executive Board Member and Shop Steward Callahan's removal from the Empire Outlets jobsite, and the purported unsafe working conditions Birns created which Respondent claims was a basis for its decision to initiate and process Union charges against Birns. Starace also testified that none of the allegations in the Union charge pertained to Respondent's unfounded belief that Birns caused Callahan's layoff and Birns' subsequent failure to get Callahan his job back at the Empire Outlets jobsite.

On larger points, like Starace's assertions that Birns placed employees in unsafe working conditions which gave rise to the basis for Starace's Union charges, Starace's testimony should be discredited because he admitted that he had no first-hand knowledge of Birns placing employees in unsafe working conditions and his testimony was nothing more than rank hearsay. Here, Starace admitted that he did not personally observe members in dangerous conditions. Starace's only accounts of Birns' alleged unsafe conduct came from Starace's alleged conversation with Callahan, who failed to appear at hearing. The evidence establishes that Starace did not conduct any investigation to determine whether or not any alleged unsafe conditions caused by Birns actually existed.

Respondent failed to call Callahan as a witness. Callahan, who continues to be on Respondent's Board, and under Respondent's control, could have provided testimony of his purported first-hand knowledge to support Respondent claim that Birns ignored Respondent's

Starace and Cuiffo's directives to remove employees from unsafe conditions, Birns somehow placed employees in unsafe working conditions, and these considerations served as Respondent's basis for bringing Birns up on Union charges. An adverse inference should be drawn that had he testified, Callahan's testimony would not have supported Respondent's position that Callahan directed Birns to remove employees from unsafe conditions, but Birns didn't, Birns placed employees in unsafe working conditions or that Respondent issued Union charges against Birns because Birns placed employees in unsafe working conditions. *Gerig's Dump Trucking*, 320 NLRB 1017, 1024-1025 (1996); *Overnite Transportation*, 329 NLRB 990, 1014 (1990); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Moreover, Respondent's failure to introduce any probative evidence, for example employee testimony, photographs, log books or notes to corroborate Starace's purely hearsay statements regarding alleged safety concerns further evidences that Birns did not place employees in dangerous working conditions and that Respondent lacked a legitimate basis for initiating and processing Union charges against Birns. Accordingly, Starace's testimony that Birns placed employees in dangerous working conditions, and that Respondent had a legitimate basis to bring Union charges against Birns should not be credited.

Similarly, Starace's testimony that the allegations in the Union charge against Birns do not relate to Birns' refusal to comply with Respondent's directive to get Callahan his job back at the Empire Outlets jobsite is discredited by the Union charge itself, which serves as the best evidence of Respondent's intent when bringing Union charges against Birns.

In the Union charge and at Birns' Union hearing, Respondent's Starace specifically accused Birns of lowering the workforce numbers to layoff Callahan and lying about Callahan so that he would be removed from the jobsite in the Union charges, and specifically charged Birns

with making Respondent and one of its brothers look bad in the Union charge. This conduct presumably violates Article XVII, Misconduct and Penalties, Section 1(m) of the SMART Constitution, which Starace cites in his Union charges. Under Section 1(m), a penalty may be imposed against a member for “[e]ngaging in any conduct which is detrimental to the best interests of this Association or any subordinate unit thereof or which *will bring said unions into disrepute*.” The safety related conduct outlined in Starace’s Union charges against Birns do not plainly relate to Section 1(m), therefore Starace’s testimony that Birns’ role in Callahan’s layoff and subsequent refusal to get Callahan’s job back was not a subject of the charges should not be credited.

Similarly, Starace’s assertion that Respondent dismissed the charges because of Starace’s faulty paperwork should not be credited. Although both Gallagher and Cuiffo admittedly served on the Executive Board which decided Birns’ Union charges, neither of them testified about nor corroborated Starace’s assertion about the reasons for Respondent dismissing the Union charges against Birns. Inasmuch as Gallagher and Cuiffo were each best positioned to talk about the deliberations that took place by Respondent in deciding to dismiss Birns’ Union charges and failed to do so, your Honor should not credit Starace’s testimony and draw an adverse inference that had Gallagher or Cuiffo testified about the reasons Respondent dismissed Birns’ Union charges, it would not have supported Starace’s testimony, that the dismissal resulted because of Starace’s faulty paperwork.

b) *James Cuiffo Should Be Discredited*

Recording Secretary James Cuiffo testified about his intimate familiarity with the International Union’s SMART Constitution and his responsibility to correspond with all of the accused facing Union charges. Cuiffo also testified about the protocol he followed after learning

about Starace's Union charges against Birns. Throughout his testimony, Cuiffo misled the court on small points, concealing on direct examination facts detrimental to Respondent's case, only conceding them after cross examination. On large points, Cuiffo failed to substantiate why he deviated from the SMART Constitution while processing Birns' Union charges. Given Cuiffo's lack of candor and bald assertions, his testimony should not be credited.

Cuiffo misled the court on small points, like who possesses standing to bring Union charges against a member. Cuiffo failed to provide forthright testimony about all who could bring the charges, only testifying on direct that members were able to bring charges. When confronted with the SMART Constitution on cross examination, however, Cuiffo conceded that the plain language of the SMART Constitution allowed union officials to bring Union charges as well, highlighting his lack of candor at hearing.

On the much larger point concerning Cuiffo's failures to follow the SMART Constitution while initiating Respondent's Union charges against Birns, Cuiffo, failed to effectively explain why he deviated from the SMART Constitution when processing Birns' Union charges.

Although the SMART Constitution provides that either the Executive Board or a trial committee may hear an accused's Union charges, and that the tribunal selected to hear an accused's Union charges will be *elected* at a special union meeting, and that the accused is entitled to notice of such meeting, Cuiffo admittedly failed to notify Birns of the meeting. Cuiffo's testimony that he didn't need to inform Birns about the meeting because it was common knowledge that the Executive Board exclusively heard Union charges should not be credited. First, Cuiffo failed to substantiate his bald assertion with any additional evidence of this common practice despite testifying to overseeing over 30 Union charges in his time as Respondent's union official. Second, the plain language of the SMART Constitution directly contradicts Cuiffo's

assertions that Respondent did not need to provide Birns with notice about the meeting. Here, it is more plausible to believe that Cuiffo failed to follow the SMART Constitution when processing Birns' Union charges because Cuiffo, along with Respondent's Starace, set to dictate Birns' fate at the Union hearing, by all but guaranteeing that Callahan's fellow Executive Board Members would decide Birns' fate at his Union hearing. In light of Cuiffo's wholly unsubstantiated assertion that Respondent commonly used its Executive Board to hear Union charges, and Respondent did not need to notify Birns of the meeting during which his Union hearing tribunal would be *elected*, Cuiffo's testimony should not be credited.

C. CASES INVOLVING UNION DISCIPLINE CAN VIOLATE SECTION 8(B)(1)(A) OF THE ACT

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or *assist labor organizations*, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," *as well as the right "to refrain from any or all such activities."*

Section 8(b)(1)(A) of the Act provides:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

Section 8(b)(1)(A) does not proscribe wholly intraunion conduct and discipline. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). Instead, Section 8(b)(1)(A) proscribes union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union

coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act. *Id.* at 1418-1419.

Union conduct or discipline impacts the employment relationship when it “ ‘impact[s]’ . . . or ‘ha[s] some nexus with the employer-employee relationship.’ ” *International Brotherhood of Electrical Workers Local 2321* (Verizon), 350 NLRB 258, 262 (2007) (citing *Office Employees*, 331 NLRB at 1418, 1424). The Board specifically found that union discipline that affects future employment opportunities bears some nexus with the employer-employee relationship. *In re Textile Processors*, 332 NLRB 1352 (2000).

Union conduct or discipline pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, and falls within the pressures condemned by Section 8(b)(1)(A) when the threatened, attempted, or actual invocation of internal disciplinary charges by a union representative has a sufficient tendency to impede employees in the exercise of rights protected by the Act. See, e.g., *Plumbers Local 13* (Mechanical Contractors Assn.), 212 NLRB 477, 479-480 (1974); *Electrical Workers IBEW Local 34* (Protection Alarms), 208 NLRB 639, 641 (1974); *Auto Workers Local 1989* (Caterpillar Tractor Co.), 249 NLRB 922, 923 (1980). In *Machinist 707* (United Technologies), 276 NLRB 985 (1985), the Board held that in cases involving a union’s filing and processing of internal union disciplinary charges against members in reprisal for and because they engaged in activity protected by Section 7 of the Act, the coercive thrust of the conduct involved was not “vitiating by the latitude afforded labor organizations under the proviso to Section 8(b)(1)(A).” *Id.* at 991.

A union’s conduct and/or discipline, or threatened union discipline, impairs policies imbedded in the Act, such as the basic policy of promoting collective bargaining, when the threatened discipline seeks to compel union members to act in contravention of a collectively

bargained for agreement, or penalizes them for complying with express provisions of a collectively negotiated agreement. *In Re Brewery, Soda & Mineral Water Bottlers of California, Local Union No. 896, Int'l Bhd. of Teamsters, Afl-Cio*, 339 NLRB 769, 769 (2003).

If the union's discipline is found to be outside of the proviso of Section 8(b)(1)(A), the Board then weighs the Section 7 rights of the union member against the legitimate interests of the union to determine whether the discipline violates the Act. See *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 (2000) (determining whether a violation of Section 8(b)(1)(A) occurred involves balancing the employees' Section 7 rights against the legitimacy of the union interest at issue).

Here, Respondent's initiation and processing of Union charges against Birns fall within the scope of Section 8(b)(1)(A) for three reasons. First, Respondent's attempt to discipline Birns carried with it the penalty of expulsion under the International's SMART Constitution, and Birns' potential to lose access to the over 150 contractors who maintain exclusive relationships with Respondent. Accordingly, the initiation and processing of Union charges against Birns had a nexus to the employer-employee relationship.

Second, Respondent's initiation and processing of Union charges against Birns stem from Respondent's attempt to coerce Birns to support the incumbent Union leadership in securing the rehire of Respondent's shop steward and Executive Board Member James Callahan, and the Board has found that this type of reprisal amounts to union coercion which is prohibited by Section 8(b)(1)(A) of the Act. *Machinists*, 276 NLRB at 991. Specifically in *Machinists*, the Board found that the proviso in Section 8(b)(1)(A) of the Act did not shield the Board from finding that a union's threats and invocation of union charges as a means to repress employees who dissented against incumbent union leadership amounted to an 8(b)(1)(A) violation.

Third, the Union's attempt to discipline Birns for refusing to support Callahan's rehire impairs policies clearly embedded in the Act, specifically Birns' Section 7 right to refrain from assisting or supporting a labor organization and Birns' right to engage in intraunion activities in opposition to the incumbent Union leadership. Moreover, it impairs the basic policy of promoting collective bargaining. Here, Respondent maintained a collective bargaining agreement which included a grievance and arbitration procedure which Respondent had full access to utilize to secure Callahan's rehire. Respondent's attempt to circumvent the collective bargaining process by attempting to compel Birns to secure Callahan's rehire, therefore, sought to compel Birns to act in contravention to the negotiated agreement between Respondent and United Sheet Metal. For these reasons, Respondent's attempt to initiate and process Union charges against Birns falls within the scope of Section 8(b)(1)(A).

Respondent may argue that this matter falls under the Section 8(b)(1)(A) proviso, and therefore a violation may not be found because the carve out affords unions the ability to impose their own rules in contexts like employee strike conduct, even if employees are engaged in Section 7 activity. However, Respondent's attempt to analogize the instant matter to a union who imposes internal union rules against employees because of their strike conduct is completely misplaced. First, the proviso merely states that Section 8(b)(1)(A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]" and the Board has narrowly construed the exemption to allow unions to impose rules about employee strike conduct because employee strike conduct rules are fashioned to protect a union's interest in retaining its membership. The proviso does not afford nor give license for a union to intimidate members who engage in protected Section 7 activity in opposition of the desires of union leadership. *Machinists*, 276 NLRB at 991. Moreover, the

proviso only applies where a union is seeking to enforce a *legitimate* union rule fashioned to *acquire or retain its membership*.

Here, where the provisions invoked by Respondent in its Union charges against Birns related to Birns' alleged refusal to follow valid rules or regulations, interference with a business agent's ability to discharge his duties, violating working conditions, and engaging in conduct detrimental to the union and placing the union into disrepute, the rules invoked by Respondent bear no relationship whatsoever to Respondent's attempt to acquire or retain union membership. Even assuming arguendo, that the rules imposed by Respondent were fashioned to acquire or retain union membership, in the instant case, as demonstrated more fully below, the rules were used solely as a pretext to retaliate against Birns, and therefore lacked any legitimacy. Accordingly the proviso should not apply in this instance.

Additionally, in balancing Birns' Section 7 rights to refrain from assisting or supporting Respondent by advocating for Callahan's rehire, and engage in intraunion activities in opposition to the incumbent Union leadership with Respondent's interest in enforcing rules that do not pertain to the acquisition or retention of union membership or bear little relationship to promoting union solidarity, the interest in protecting Birns' protected activity wholly outweighs Respondent's interests.

First, Respondent has no legitimate interest in enforcing a legitimate rule since none of the rules it sought to impose against Birns related to the acquisition and retention of union membership, and the rule itself was not legitimately imposed against Birns.

Second, Respondent's Union charges run afoul of Birns' Section 7 rights. The threatened discipline against Birns reasonably tends to restrain and coerce Birns from exercising his Section 7 rights to refrain from assisting or supporting Respondent in its attempt to secure Callahan's

rehire and to engage in intraunion activity in opposition of Respondent's incumbent union leadership. While Respondent may have some interest in maintaining loyalty and solidarity of its members, Respondent's interests should not outweigh the interest of its members, and United Sheet Metal's employees to engage in Section 7 rights to refrain from supporting Respondent or engaging in intraunion activity in opposition of Respondent's incumbent union leadership, especially where Respondent seeks to use its rules for the unlawful purpose of retaliating against employees.

Third, Birns' interest in exercising his Section 7 rights outweighs any interest the Respondent might have in imposing discipline against Birns for purportedly placing employees in unsafe working conditions. Here, Respondent's attempt to discipline Birns as a means of reprisal directly contravenes the Act and its policies. Therefore, Birns' Section 7 activity outweighs Respondent's interest in promoting solidarity, and your Honor should consider the merits of the 8(b)(1)(A) violation.

***D. RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY
INITIATING AND PROCESSING UNION CHARGES AGAINST HOWARD
BIRNS***

As in the instant case, where an alleged 8(b)(1)(A) violation turns on motive, the Board requires that the charge be analyzed under the framework set out in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1968), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *See Plasters Local 121*, 264 NLRB 192 (1982) (refusal to refer in hiring hall in retaliation for protected activity); *Teamsters General Local Union No. 200*, 357 NLRB 1844 (2011). "Under *Wright Line*, the General Counsel must establish (1) that the employee/union member engaged in protected concerted activity; (2) the employer/union has knowledge of that activity; and (3) animus or hostility toward this activity was a motivating factor in the

employer/union's decision to take the adverse action in question against the employee/union member." *Teamsters General*, 357 NLRB at 1852. "Once the General Counsel establishes that the employee/union member's protected activity was a motivating factor in the decision, the burden of persuasion shifts to the employer/union to show, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected activity." *Teamsters General*, 357 NLRB at 1852 (citing *Transportation Management Corp.*, 462 U.S. 393 (1983)).

"[W]hen an employer/union's stated motives for the actions are found to be false, however, it is well settled that the circumstances may warrant an inference that the true motive is one that the employer/union desires to conceal. . . . Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole." *Teamsters General*, 357 NLRB at 1852 (citing *Fluor Daniel, Inc.*, 304 NLRB 970 (1991)).

"Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted, even without direct evidence. Evidence of suspicious timing (*Adco Electric*, 307 NLRB 1113, 1123 (1992), *enfg.* 6 F.3d 1110 (5th Cir. 1993)), and false reasons given in defense (*Electronic Data Systems Corp.*, 305 NLRB 219 (1991)), may support an inference of animus and discriminatory motivation." *Teamsters General*, 357 NLRB at 1852.

To establish an affirmative defense, an employer/union must present a legitimate reason for its action and persuade, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected activity. *Teamsters General*, 357 NLRB at 1852 (citing *F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enfd.* F. 3d 1139 (6th Cir. 1996)).

Where the Board finds that the reasons advanced by the employer/union either did not exist or were not relied upon, there will be a finding of pretext and an inference of wrongful

motive, defeating any attempt by the employer/union to show that it would have taken its action absent an employees' protected activities. *Teamsters General*, 357 NLRB at 1852 (*internal citations omitted*).

1. Birns Engaged in Activity Protected Under Section 7 of the Act when He Refused to get Callahan his Job Back

An employee's right to assist or support a labor organization, or refrain from engaging in such activity is concerted activity protected by Section 7, and is, of course, elementary. Moreover, under established Board law, "an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7...." *Machinists Local 707 (United Technologies)*, 276 NLRB 985 (1985) (citing *Steelworkers Local 1397 (United States Steel Corp.)*, 240 NLRB 848, 849 (1979)). The Board has previously held that a threat to have an employee discharged in retaliation for that employee's dissent over intraunion matters violates Section 8(b)(1)(A) of the Act. *Highway, City and Freight Drivers, Local Union. 600 (Commercial Lovelace, et al.)*, 250 NLRB 1127 (1980). As the Court of Appeals for the Second Circuit noted in *N.L.R.B. v Local 485, International Union of Electrical Workers*, 454 F .2d 17, 21, fn. 6 (1972), "the right to criticize union leadership" is clearly protected by Section 7 of the Act.

Here, it is clear that Birns refrained from assisting Respondent, and refused to engage in intraunion conduct, activity which is protected by Section 7 of the Act. Respondent's union leadership, by Representative Starace attempted to compel Birns to support Respondent's position that Callahan should be reinstated by threatening to bring Birns up on Union charges if Birns refused to use his position as foreman to get Callahan his job back. Respondent's attempts to compel Birns to engage in such conduct was a means to circumvent the grievance with United Sheet Metal and force Birns to negotiate the Callahan's rehire outside of the grievance and

arbitration procedure in the collective bargaining agreement. Section 7 of the Act clearly affords employees the ability to refrain from assisting a labor organization. Birns exercised his Section 7 right by opposing and refusing Respondent's demand that Birns seek Callahan's rehire, conduct that is protected under the Act.

2. Respondent Learned of Birns' Protected Activity as Soon as Birns Refused to get Callahan his Job Back

The record evidence conclusively demonstrates that Respondent knew of Birns' refusal to accede to Respondent's demand that Birns get Callahan his job back. In that regard, Birns testified that when Starace initially told Birns to get Callahan back on the jobsite, or he would be brought up on charges, Birns replied, "it's not up to me to hire or fire people. That's up to the owner, Joe." [Tr. 67]. "If Joe hires him back, I have no problem with bringing Jimmy back[.]" [*Id.*] As outlined above, your Honor should credit Birns' and Elms' testimony about Starace's threats and similarly credit Birns' testimony that he told Starace it wasn't up to him to hire or fire people and that the decision about rehiring Callahan was up to the owner Joe and not Birns.

Additionally, your Honor should infer Respondent knew about Birns' refusal to accede to Respondent's demand that Birns get Callahan his job back based on Respondent's Union charges and Respondent's timing with filing its Union charges. In the Union charges, Respondent specifically charges Birns for Callahan's removal from the Empire Outlets jobsite, and impliedly Birns' failure to use his position as foreman to secure Callahan's rehire on the Empire Outlets jobsite. By making this reference, it is reasonable to infer that Respondent knew Callahan's removal would not be remedied by Birns.

Your Honor should also infer Respondent knew about Birns' protected activity based on the timing between Birns' activity and Respondent filing its Union charges. Birns cites that Respondent's Starace made subsequent threats towards him in the weeks after Callahan's

removal on June 26th. Birns' testimony is consistent with the timing of Respondent's Union charges over a month later, after Respondent understood that its repeated threats toward Birns would not cause Birns to use his position as foreman to secure Callahan's rehire.

3. Respondent Initiated and Processed Union Charges Against Birns In Retaliation for His Protected Activity

a) *Respondent Threats Toward Birns Demonstrate Respondent's Animus Toward Birns*

The record also demonstrates that Birns directly opposed Respondent's incumbent leadership's directive and wish to get shop steward and Executive Board member Callahan's job back, and that Respondent harbored animus toward Birns because Birns opposed and refused to accede to Respondent's demands. In that regard, animus is established by Starace's threats to Birns, -- either support Respondent's directive to get Callahan rehired or face the consequences -- and be brought up on Union charges.

In addition, as Respondent filed and processed Union charges against Birns beginning on August 7, 2017, shortly after Birns' refusal to assist Respondent in securing Callahan's rehire during the end of June and beginning of July 2017, the timing of Respondent's conduct leads to the inescapable conclusion of Respondent's unlawful motivation in filing charges against Birns.

b) *Respondent's Pretextual Reasons for Initiating and Processing Union Charges Against Birns Demonstrates Respondent's Unlawful Motivation*

Contrary to the overwhelming probative record evidence, Respondent asserts that it initiated and processed Union charges against Birns not because of Birns' protected activity, but because Birns placed employee members in unsafe working conditions. Respondent's bald assertions that it had a legitimate basis to initiate and process Union charges against Birns is wholly unsupported by the record evidence. Respondent failed to produce a scintilla of credible

evidence that its claims against Birns for placing employees in unsafe working conditions were substantiated. Instead, the evidence readily establishes that Respondent's decision to issue Union charges against Birns for allegedly placing employees in unsafe working conditions was nothing more than pretext. Here, Respondent did not introduce any testimony from any employee witness who witnessed or experienced the alleged unsafe working conditions Birns purportedly subjected employees to. In addition, Respondent did not conduct any investigation into the alleged unsafe working conditions Birns purportedly subjected employees to, and Respondent did not produce any probative testimonial or documentary evidence supporting Respondent's assertion that Birns somehow placed employees in unsafe working conditions that warranted Birns being brought up on Union charges.

Moreover, Respondent's shifting assertions for the reasons why it initiated and processed the Union charges against Birns further reflects that Respondent had no valid basis to initiate and process Union charges against Birns, except for its desire to retaliate against Birns because of his protected activity. In this regard, Respondent baldly asserted at trial that it initiated and processed Union charges against Birns because Birns had Elms perform a crane pick without a harness, when those allegations were never included in the Union charges issued toward Birns. Respondent bald assertion in its Union charges that Birns placed employees in a work area with eight (8) feet of water inexplicably shrank to only four (4) inches of water when Respondent testified at hearing. Respondent's inability to introduce any evidence whatsoever to legitimize its decision to initiate and process Union charges against Birns reveals that Respondent's purported reasons for initiating and processing Union charges against Birns were a complete ruse designed to conceal Respondent's unlawful motivations.

Accordingly, since Respondent's asserted reasons for initiating and processing Union charges against Birns were pretextual, Respondent may not attempt to show that it would have brought Birns up on Union charges even in the absence of his protected activities.

4. Respondent Did Not Have a Legitimate Basis to Initiate and Process Union Charges Against Birns

Even assuming arguendo, that Respondent's purported reasons for initiating and processing Union charges against Birns were not pretextual, Respondent has not carried its burden of persuasion by showing that it had a legitimate basis for its conduct against Birns, and that it would have taken the same action against Birns even in the absence of Birns' protected activity. Without any evidence of proof supporting its claims that Respondent placed employees in unsafe working conditions, Respondent has not shown by a preponderance of the evidence that it had a legitimate business reason for initiating and processing Union charges against Birns.

5. Respondent Failed to Produce Any Evidence that it Would Have Brought Birns up on Union Charges Even if Birns Had Not Refused Respondent's Directive to Try to Get Callahan Back at Work

Respondent produced no evidence that it would have disciplined Birns even in the absence of Birns' protected activity. Despite Cuiffo testifying to overseeing over thirty Union hearings against members in his time as Recording Secretary, Secretary Treasurer, and an Executive Board Member, Respondent failed to produce any evidence that Respondent initiated and processed Union charges against a member for the purported safety violations that Birns allegedly committed. Without any evidence that Respondent would have initiated and processed charges against Birns for purportedly placing members in unsafe working conditions, Respondent has failed its burden of persuasion.

E. RESPONDENT'S DEFENSES FAIL

Respondent argues that even if your Honor finds the above facts to be true, Respondent cannot be held liable for Starace's conduct, because Starace is not Respondent's agent, as defined by Section 2(13) of the Act, because Starace acted in his personal rather than official capacity when he filed the Union charges against Birns, and because Respondent neither condoned nor ratified Starace's conduct. Respondent also asserts that the Complaint fails to state a claim under which relief may be granted. All of Respondent's defenses fail.

1. Respondent's Business Representative Salvatore Starace Was an Agent of Respondent within the Meaning of Section 2(13) of the Act, who Acted as Respondent's Agent with Actual and Apparent Authority When he Initiated and Processed Union Charges Against Birns

In its answer, Respondent denied Starace's status as Respondent's agent under Section 2(13) of the Act. At hearing however, Respondent conceded that Starace was an agent of Respondent for the purpose of Starace to serve as its principal, capable of listening to the testimony of all of the witnesses in the instant proceeding. Yet, Respondent argued that when Starace initiated and processed Union charges against Birns, Starace was not an agent of Respondent, and acted in his personal capacity as a union member rather than his official capacity as Respondent's business agent. As set forth below, the evidence establishes that Starace was Respondent's agent under the Act who acted in his official capacity as Respondent's agent, with actual and apparent authority, when Starace initiated Union charges against Birns.

a) *Legal Standard for Agency Under Section 2(13) of the Act*

The Board applies common law agency principles to determine whether an individual was acting as the agent of a principal in the course of making a particular statement or engaging in particular conduct. *Hausner Hard-Chrome of Ky, Inc.*, 326 NLRB 426, 428 (1998). The Board will find that a person is an agent if the evidence establishes that the person possessed

actual or apparent authority to act on the principal's behalf. *PCC Structural, Inc.*, 330 NLRB 868, 869 (2000).

"Express actual authority derives from an act specifically mentioned to be done in a written or oral communication." *N.L.R.B. v. Dist. Council of Iron Workers of the State of Cal. and Vicinity*, 124 F.3d 1094, 1098 (9th Cir. 1997) (citation omitted). Apparent authority exists where there is a "manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Hausner Hard-Chrome*, 326 NLRB at 428 (citing *Southern Bag Corp.*, 315 NLRB 725 (1994), and other authorities).

Section 2(13) of the Act, moreover, provides that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such person responsible for his act, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Thus, the Act does not require, in order to establish agency, proof that the employer authorized the actor to engage in the particular conduct at issue. Accordingly, "agency principles must be broadly construed in light of the legislative policies embedded in the Act." *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995).

b) *At All Material Times, Representative Starace was an Agent of Respondent*

The evidence shows that Starace's position as business representative, is cited in Respondent's Constitution as an elected office, and that Starace's powers, duties and responsibilities are expressly set forth in and clearly derived from Respondent's Constitution. Those duties include settling all disputes between employers and employees, reporting on those disputes, making reports of the work performed, and attending Executive committees.

Additionally, Starace admitted to addressing safety disputes with United Sheet Metal concerning the Empire Outlets jobsite, and filing grievances on behalf of members, such as James Callahan.

The evidence also supports a finding that Starace is an agent of Respondent with the express and apparent authority to act on behalf of Respondent.

Respondent's Constitution gives Starace the express authority to initiate Union charges against a foreman where the business representative finds the foreman commits deliberate violations of Respondent's rules, and in this case, Starace abusively exercised his express authority under Respondent's Constitution by initiating and processing Birns based on baseless allegations purportedly asserted by Respondent's union official and Executive Board Member Callahan.

Additionally, inasmuch as Callahan is a shop steward and Executive Board Member, and union official of Respondent, Callahan purportedly provided Starace with the ammunition to bring Respondent's Union charges against Birns, and Starace filed the Union charges against Birns to punish Birns for his failure to seek Callahan's rehire, it is reasonable for Birns to believe that Callahan, as an official of Respondent, authorized Starace to bring Union charges against Birns on Respondent's behalf. For these reasons, Starace your Honor should find that Starace was an agent of Respondent when he initiated and processed Union charges against Birns.

Respondent's argument that Respondent's failure to ratify Starace's conduct somehow negates an agency finding is completely misplaced. First, as explained above, in order to establish agency, the Act does not require proof that Respondent authorized or subsequently ratified Starace's conduct. In any event, the evidence shows that Respondent *did, in fact*, ratify Starace's conduct. Specifically, when Respondent's Cuiffo failed to respond to Birns' request for clarification concerning the basis of the charges, despite the SMART Constitution affording

the accused the right to know the specific allegations against them, and Cuiffo denied Birns' notice of the meeting during which his tribunal would be elected, and further imposed the Executive Board as Birns tribunal despite the SMART Constitution affording Birns an election of a trial committee or the Executive Board, Respondent ratified Starace's conduct to bring the Union charges against Birns, and an agency finding could still be found since there is no plausible reason for Respondent's Cuiffo to fail to follow the SMART Constitution, outside of Respondent exercising its own intent to retaliate against Birns. Respondent further ratified Starace's conduct by proceeding to hearing against Birns and at no time disavowing Starace's conduct. Accordingly, your Honor should find that Starace acted as an agent of Respondent when bringing Union charges against Birns.

c) ***Representative Starace Acted in his Official Capacity as Business Representative when he Filed and Processed Union Charges against Birns***

Respondent's argument that Starace acted in his personal rather than official capacity when bringing the Union charges against Birns similarly fails because the preponderance of the evidence shows Starace acted in his official capacity as a business representative and agent of Respondent when he filed and processed the Union charges against Birns. First, Article XVIII, Section 1(a) of the SMART Constitution, Charges and Trials, which states that "charges against officers, representatives or members of any local union or council may be preferred in the manner provided in this Article by any member or members, ***local union or council or any officer or representative thereof*** or by any General Officer or International Representative of this Association[.]" granted Starace with the express authority to issue charges against Birns as a representative of Respondent. [Jt. Exh. 2 Art. XVIII p. 99].

Second, Starace signed the Union charges as Business Representative, and not as a member of Respondent. While Starace provided self-serving testimony that he filed the charges

as a member rather than as a business representative, the Union charge itself contradicts Starace's self-serving claim. In addition, Starace's bald assertion that he filed the Union charge as a member is not supported by the record evidence, as the evidence establishes that Starace was not a member of Respondent or the International Union under the SMART Constitution.

Under the SMART Constitution, to be a member of the International Union, and therefore a member of a local union, like Respondent, and be entitled to the rights thereof, one must "be a worker in one or more industries covered by the jurisdictional claims of the International [Union]," which includes the fabrication, manufacture, erection and installation, handling alteration, repair, dismantling, etc. of all Heating Ventilation, Air conditioning and or refrigeration and sheet metal work. [Jt. Exh. 2 Art. 16 Sect. 1(a) p. 78, Art. I, Sect. 5(a) p. 2]. Yet Starace admitted he never performed subcontract work as a laborer on behalf of Respondent. Starace's own application for membership into the International Union does not specify that Starace worked for an employer performing work under the International's jurisdiction or was affiliated with a specific local union. (Moreover, Starace's application does not bear a seal from the International Union of its recognition of Starace's membership, nor an initiation date). While the application is signed, it bears the signature of John Harrington, Respondent's Financial Secretary-Treasurer at the time. While it is customary for business representatives to pay dues to the unions for which they work as a condition of their employment and to show of solidarity with the members they represent, dues payments alone, as outlined in the SMART Constitution, is not the standard by which to measure an individual's union membership status.

Accordingly, the evidence fully supports that Starace is not a member of Respondent or the International Union as defined by the SMART Constitution; therefore Starace could not have filed the Union charges against Birns in Starace's personal capacity as a member. Rather,

Starace's status as an officer or representative of Respondent was the only way Starace maintained standing to file the Union charges against Birns. Based on the record evidence therefore, Your Honor should find that Starace filed the Union charges against Birns in his official capacity as Respondent's business representative.

2. Respondent's Failure to Impose a Penalty Against Birns Does Not Preclude Your Honor from Finding a Violation in this Matter

Respondent provides no basis to support its bald assertion that it should not be found in violation of Section 8(b)(1)(A) of the Act. Board law in the instant matter makes clear that the initiation and processing of Union charges against a member in retaliation of for the member's Section 7 activity notwithstanding a penalty still amounts to a violation of the Act. Furthermore, the Board has long held that a party may correct its arguably unlawful conduct by repudiation. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). There, the Board held that an effective repudiation must be "timely," "unambiguous", "specific in nature to the coercive conduct" and "free from other proscribed illegal conduct." *Id.* (citing *Douglas Division*, 228 NLRB 1016 (1977)). Furthermore, there must be adequate publication of the repudiation to the employees involved, and the employer (or, as here, the union) must not engage in any further proscribed conduct after the publication. Finally, the repudiation or disavowal of coercive conduct must include an assurance to employees that, going forward, there will be no interference with employee Section 7 rights. *Id.* at 138–139.

Here, Respondent has failed to present any evidence that it has repudiated Starace's conduct by publicly acknowledging to employees, including Birns, that it unlawfully initiated and processed Union charges against Birns because of his refusal to accede to Starace's demand to secure Callahan's rehire, or be brought up on charges. Respondent has also failed to produce

any evidence showing that it informed employees that it will not engage in this coercive conduct or interfere with employees' Section 7 rights in the future. For these reasons, your Honor should find a violation in this matter.

3. The Complaint States a Claim under Which Relief Can be Granted, and Sufficiently Places Respondent on Notice of the Allegations Alleged

In its answer, Respondent asserts that the Complaint fails to state a claim for which relief can be granted. As an initial matter, a defense that a complaint fails to state a claim under which relief may be granted is a traditional defense found in civil litigation, not before the Board. Without more, it is unclear what Respondent precisely argues based on this defense. At trial, Respondent elicited testimony from Birns to highlight that while Birns' original unfair labor practice charge did allege the Union charges were a violation of the Act, Birns did not specifically allege that Respondent initiated and processed the Union charges *because Birns refused to use his position as foreman to secure Callahan's rehire*. By raising this point, it appears Respondent attempts to argue that the Complaint is somehow barred because it contains an allegation that Respondent believes was not precisely plead in the charge. Respondent raised a similar argument in a Motion to Dismiss Complaint it improperly filed with Judge Chu days prior to the start of the hearing in this matter. While the undersigned filed an Opposition to Respondent's Motion to Dismiss ("Opposition Motion") with Judge Chu on September 17, 2018, in light of the evidence adduced by Respondent at hearing, and Judge Chu's decision to issue a ruling on the motion to dismiss in his administrative law judge's decision, the arguments contained in the General Counsel's Opposition Motion are worth repeating here.⁴

⁴ This argument serves to augment, rather than supersede the General Counsel's position on this point, as fully articulated in Counsel for the General Counsel's Opposition to Respondent's Motion to Dismiss Complaint, filed with the Division of Judges on September 17, 2018.

The United States Supreme Court has held that a complaint may encompass any matter sufficiently related to or growing out of conduct alleged in a charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959); *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940). In *Nickles Bakery of Indiana*, 296 NLRB 927, 927-928 (1989), the Board held that a “closely related” standard should be applied in assessing whether allegations not specifically included in a charge could be included in a complaint. Under the “closely related” standard, allegations are “closely related” if they involve the same legal theory as the specifically alleged conduct, they arise from the same factual circumstances or sequence of events and the pending timely charge, and the respondent would raise the same or similar defenses to both allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1115-1116 (1988). Pleading of all the evidence in the charge is not required.

Here, the allegation in the Complaint is clearly encompassed by the express language of the timely charge. The unfair labor practice charge alleges that Respondent violated the Act by bringing Union charges against Birns. The Complaint alleges that Respondent violated the Act by bringing Union charges against Birns because Birns refused to use his position as foreman to secure Callahan’s rehire.

Even if one were to argue that the allegation in the Complaint is not expressly covered in the charge, the Complaint allegation closely relates to the express language of the charge in that Respondent’s threats to Birns to bring Callahan back or be brought up on charges arose from the same factual circumstances leading up to the Union charges, and Respondent is raising the same defenses at trial it would have raised had the unfair labor practice charge included evidence of the threats.

For these reasons, the Complaint states a claim under which relief may be granted, and Respondent’s attempt to have this Complaint dismissed on this basis must fail.

To the extent Respondent argues that the Complaint is deficient and should be dismissed because it does not contain particularized facts espousing the Region's legal theory of the violation its argument is unsupported by the Board's Rules and Regulations and therefore equally without merit.

Section 102.15 of the Board's Rules and Regulations only requires that a complaint include "(b) a clear and concise description of *the acts which are claimed to constitute unfair labor practices*, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

It is apparent that the Complaint fully comports with the requirements of Section 102.15. The Complaint clearly identifies the acts claimed to constitute unfair labor practices, including the dates, and places of such acts and the names of Respondent's agents alleged to have committed the unlawful acts, the Complaint is sufficiently plead and Respondent's attempt to dismiss the Complaint on this basis should be denied.

V. CONCLUSION

Based on the foregoing, and the record as a whole, General Counsel submits that the weight of the credible evidence and the uncontradicted evidence establishes that Respondent violated Sections 8(b)(1)(A) of the Act as alleged in the Complaint.

Accordingly, it is respectfully requested that Your Honor find the violation as alleged in the Complaint and as set forth in the post-hearing brief, impose a notice positing, and award all other relief as may be just and proper to remedy the unfair labor practice alleged.

Dated: November 26, 2018

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